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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000216-MR

RONALD E. HINES — APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 88-CI-000812

BARNETT BANK OF TAMPA, N.A., N/K/A BANK OF AMERICA; PEOPLES STATE BANK OF CHAPLIN, KENTUCKY, N/K/A KING SOUTHERN BANK; WARREN L. PULLIAM; JANICE L. PULLIAM; KERRY W. PULLIAM; PAUL A. SIMS; CHAPLIN INSURANCE AGENCY, INC.; AND W & J PULLIAM, INC. — APPELLEES

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BANK; AND RONALD E. HINES APPELLEES

OPINION
DISMISSING IN PART,
AND AFFIRMING IN PART

** ** ** ** **

BEFORE: ACREE, CLAYTON AND WINE, JUDGES.

ACREE, JUDGE: This is the consolidated appeal of Warren L. Pulliam (Pulliam), Janice L. Pulliam, Kerry W. Pulliam, Paul A. Sims, Chaplin Insurance Agency, Inc. and W & J Pulliam, Inc. (Pulliam Appellants), and the Pulliam Appellants' former attorney, Ronald E. Hines. The appeal arises from the Pulliam Appellants' unsuccessful efforts to intervene and set aside an agreed order, entered in 1989, dismissing a lawsuit between the Appellees, Barnett Bank of Tampa, N.A., n/k/a Bank of America (Barnett Bank) and Peoples State Bank (Peoples) of Chaplin, Kentucky, the plaintiff and defendant below, respectively. Additionally, the Pulliam Appellants and Hines contest sanctions imposed against them as a result of the attempted intervention. We dismiss in part and affirm in part.

Because the Pulliam Appellants present arguments grounded in constitutional due process guarantees, we are obligated to present the relevant facts and procedure of this case in some detail.

I. FACTS AND PROCEDURE

Pulliam was once the president and principal owner of Peoples. In 1986, Pulliam agreed to indemnify Peoples for losses arising from his wrongful issuance of certified checks. He and Peoples entered into a restitution agreement to that effect, but Pulliam later brought suit in Nelson Circuit Court against Peoples and one of its

directors, James King, to set aside that agreement. That litigation terminated when the parties entered into a settlement agreement in which Pulliam admitted his wrongdoing, reaffirmed his obligation to indemnify Peoples for all losses and expenses, and released Peoples and King from all claims. Pulliam has attempted to resurrect that case by means of post-trial motions.

On February 1, 1988, Barnett Bank filed the underlying lawsuit against Peoples in Jefferson Circuit Court, seeking reimbursement for sums it had been induced to pay to Peoples as a result of Pulliam's misconduct. Pulliam admittedly knew of the lawsuit, in fact gave his deposition in the case, but did not attempt to intervene at that time. In 1989, Peoples and Barnett Bank settled their dispute when Peoples paid Barnett Bank the sum of $200,000 in exchange for a release of all claims. An agreed order of dismissal with prejudice was entered on October 12, 1989.

In May 1990, Peoples' subrogee, Ohio Casualty, sued Pulliam in federal district court seeking indemnity, contribution, and subrogation for amounts paid as a result of Pulliam's misdeeds while at Peoples. In July 1992, pursuant to a jury verdict, the United States District Court entered a judgment against Pulliam in the amount of $200,000.00. Pulliam did not appeal. However, he has since unsuccessfully attempted on several occasions to avoid or delay his obligation to Ohio Casualty. He filed motions to set aside the judgment pursuant to Federal Rules of Civil Procedure (FRCP) 60(b) in 1995 and 2004.

On February 11, 1992, Pulliam was convicted in the United States District Court for the Western District of Kentucky at Louisville on one count of bank fraud and three counts of aiding and abetting bank fraud. His sentences of one year for each offense were to run concurrently, though execution of the sentence was suspended and Pulliam was placed on probation for a period of five years.

On February 17, 2005,[1] more than fifteen years after the underlying lawsuit had been dismissed, the Pulliam Appellants filed a motion to intervene and to set aside the Jefferson Circuit Court's 1989 order of dismissal. They claimed the settlement and agreed order of dismissal entered into between Peoples and Barnett Bank was accomplished by the perpetration of a fraud upon the court. On March 8, after considering the lengthy motions and memoranda, the trial court denied Appellants' motion.

The Pulliam Appellants, on March 21, filed a motion to alter, amend or vacate that March 8 order. The motion was argued before the trial court on June 20. Hines presented the Pulliam Appellants' factually unsupported allegations of collusion and fraud upon Peoples or the trial court, or both. Peoples' counsel responded with a recitation of Pulliam's various attempts to collaterally attack the judgments that had been entered against him. She concluded by generally requesting the trial court to keep open the possibility of awarding sanctions on a proper motion.

On July 13, the court entered an order denying the motion to vacate its previous order, holding there was "no viable basis to allow Movants to intervene in this 1988 case which came to final judgment in 1989."

A month later, on July 21, Peoples filed a motion pursuant to Kentucky Rules of Civil Procedure (CR) 11 for sanctions against Hines and the Pulliam Appellants. The very next day, Hines, on behalf of his clients and by necessary implication on his own behalf, filed an "Objection to Motion for Sanctions" because a prior obligation prohibited his attendance at the hearing.

When the trial court called the docket on July 25, counsel for Peoples represented to the trial court that she had spoken with Hines' assistant and agreed to

[1] All of the events relative to this review occurred in 2005. Therefore, unless otherwise noted, dates given are in the calendar year 2005.

allow Hines time to respond to the motion, and to allow Peoples time to reply to that response. Counsel for Barnett Bank was also in attendance, having filed its own CR 11 motion for sanctions that morning. That motion was served upon Hines himself, and upon the Pulliam Appellants through Hines, on July 25. The trial judge entered an order on July 26 setting the agreed-upon briefing schedule.

On August 8, Hines, again on behalf of his clients and himself, filed a response both to Peoples' and to Barnett Bank's motions for sanctions.

On August 25, the Pulliam Appellants filed their own, unrelated motion to certify as final the March 8 order denying intervention and the July 13 order denying the motion to vacate the previous order. Hines noticed that motion to be heard on August 29. Peoples' counsel and Barnett Bank's counsel appeared at the hearing, but Hines did not. Noting their desire to keep client costs to a minimum, they declined the court's offer of time to submit a response to Hines' motion. Instead, however, they presented to the trial court a copy of the definitive case on Appellants' motion, *Ashland Public Library Bd. of Trustees v. Scott*, 610 S.W.2d 895 (Ky. 1981).

Shortly after the hearing and with leave of court, both counsel submitted supplemental affidavits supporting their claim for CR 11 sanctions. Those affidavits reflected the time they had spent and costs expended preparing for and attending the August 29 hearing, a hearing Hines himself failed to attend. Furthermore, they set forth the supplemental argument that Hines' motion to certify the March 8 and July 13 orders also failed to meet the requirements of CR 11.

On September 2, before he could respond to these supplemental affidavits, Hines was injured in an unfortunate fall. On September 8, with Hines' apparent authority and on his behalf, attorney Gary Tabler filed a motion to continue the case for thirty days or until further orders of the Court. The next day, Hines wrote to

counsel for Peoples seeking an agreed order allowing him to withdraw from representation of the Pulliam Appellants. On September 15, Peoples' counsel responded to Hines' letter. She had obtained permission from Barnett Bank's counsel to speak for them both. They had no objection to Hines' withdrawal. However, they emphasized that

> it would be inappropriate for us to sign an Agreed Order regarding your withdrawal, particularly in light of the pending *Motions for Sanctions that both my client and Barnett Bank intend to pursue*. [emphasis supplied].

Those motions, it went without saying, were not only against the Pulliam Appellants, but against Hines himself.

Hines filed his motion to withdraw on October 3, 2005, and for an additional sixty days to allow the Pulliam Appellants time to find new counsel. That motion was to be heard on October 10. Again, when the trial court called the docket, counsel for Peoples and Barnett Bank were present. Hines failed to appear or to send a surrogate.

The court was not inclined to allow the continuance of the case for an additional sixty days. Counsel for Barnett Bank informed the court that Tabler, who had signed Hines' September 8 motion seeking a continuance, was already representing the Pulliam Appellants in the Nelson Circuit Court action. Hines' assistant had informed counsel that Tabler intended to enter an appearance in this case. The trial court granted Hines' motion for leave to withdraw on October 11, but denied the sixty-day continuance.

On October 18, Tabler filed a motion to substitute as counsel for the Pulliam Appellants. The motion was heard on October 24. At the hearing, Appellees' counsel believed it appropriate to ask for a hearing on their CR 11 motions. Tabler did not object but sought and obtained additional time to respond to the Appellees'

supplemental affidavits. Tabler, as counsel for the Pulliam Appellants, and counsel for each of the Appellees, presented oral argument to the trial court on December 14, 2005.

On December 21, the circuit court entered an order granting the CR 11 motions and awarding sanctions against the Pulliam Appellants and Hines, jointly and severally, in favor of Peoples and Barnett Bank in the amounts of $11,244.48 and $16,533.00, respectively.

The Pulliam Appellants filed their notice of appeal with this Court on January 20, 2006. Specifically, they appealed: (1) the March 9 order denying intervention; (2) the July 13 order denying the motion to vacate the March 9 order; and (3) the December 21 order imposing CR 11 sanctions.

Hines filed his own notice of appeal of the only order that affected him, the December 21 order granting sanctions.

The appeals have been consolidated for our review.

We first address the Appellees' contention that the Pulliam Appellants' appeal from the March 9 and July 13 orders is untimely and should be dismissed. Appellees' first raised this issue before this Court on their joint motion to dismiss. A three-judge motion panel denied the motion, but granted leave to renew the argument as part of their arguments submitted to the merits panel. We have considered this argument and believe it to have merit.

II. UNTIMELY APPEALS

In response to Appellees' motion to dismiss before this Court, the Pulliam Appellants argued that the March 9 and July 13 orders were interlocutory. Thus, they argue, when the circuit court denied their motion to certify the orders pursuant to CR 54.02, the orders did not become final and appealable until the court entered its December 21 order ruling on the motion for sanctions, at which point it dispensed with

all of the matters pending before it. Appellants are wrong. The circuit court correctly relied upon *Ashland Public Library, supra,* and properly denied the Pulliam Appellants' motion to certify the judgments.

In *Ashland Public Library*, our Supreme Court was asked to decide whether the order of a trial court denying a motion to intervene in a civil action was an appealable final order even though it did not contain a recitation of the language set forth in CR 54.02(1). In holding that the denial was final, the Court reasoned:

> The provisions of CR 54.02(1) do not encompass orders denying intervention. Applicants for intervention are not parties to an action and do not present claims for relief in an action unless and until they are permitted to intervene. Rather, they seek to become so that they may then assert a claim or defense in the action. CR 24.03.

Ashland Public Library at 896.

While *Ashland Public Library* dealt with a pre-judgment motion to intervene, we hold that its underlying principle applies as well to post-judgment motions to intervene. The March 9 and July 13 orders were immediately final and appealable and did not require CR 54.02 language to be so. Once thirty days passed after the entry of each of those orders, it was too late to appeal them.

The Pulliam Appellants argue alternatively that the orders were not final and appealable because Appellees moved for the imposition of sanctions against the Appellants before the issuance of the July 13 order.[2] In disregard of CR 76.12(4)(c)(iv)[3], Appellants do not cite any portion of the record for this assertion. We presume it refers to Peoples' counsel's comments at the June 20 hearing on the motion to vacate when

[2] The Pulliam Appellants do not repeat this argument in their brief. It appears only in their response to the motion to dismiss presented to the Court of Appeals' motion panel. We address it nevertheless.

[3] When a party fails to comply with CR 76.12(4)(c)(iv), nothing less than manifest injustice will *obligate* this Court to serve the advocate's function of searching the record to substantiate a party's assertion of fact. *See Elwell v. Stone*, 799 S.W.2d 46, 47-48 (Ky.App. 1990).

she noted that the motion so lacked merit as to subject the parties to sanctions. In any event, a motion for sanctions is collateral to the merits of the case, *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 398, 110 S.Ct. 2447, 2457, 110 L.Ed.2d 359 (1990), and does not extend or toll the time for filing an appeal of a final judgment.

CR 73.02(2) provides that "[t]he failure of a party to file timely a notice of appeal, cross-appeal, or motion for discretionary review shall result in a dismissal or denial." Under these circumstances, we are obligated by this rule to dismiss the Pulliam Appellants' appeal from the March 9 and July 13 orders, for failure to timely file a notice of appeal.

What remains are Appellants' appeals of the December 21 order imposing sanctions against them. Regarding this order, both Appellants filed timely notices of appeal.

III. STANDARD OF REVIEW

In *Clark Equipment Company, Inc. v. Bowman*, 762 S.W.2d 417 (Ky.App. 1988), this Court reviewed an order denying the imposition of CR 11 sanctions. Necessarily, the Court adopted a standard of review of such orders.

> We believe . . . that *where sanctions have been denied*, our review is limited to a determination of whether the trial court abused its discretion.

Clark, 762 S.W.2d at 420 (emphasis supplied). The Court did not stop there, however. In *dicta*, this Court suggested the standard Kentucky would adopt if presented with a review of the imposition, rather than the denial, of CR 11 sanctions.

> While some courts apply an across-the-board abuse of discretion standard of review to all Rule 11 rulings, *e.g.*, *Mihalik v. Pro Arts, Inc.*, [851 F.2d 790, 793 (6th Cir. 1988)], we think *where sanctions are imposed* our role requires a multi-standard approach, that is, a clearly erroneous standard to the trial court's findings in support of sanctions, a de novo review of the legal conclusion that a violation

> occurred, and an abuse of discretion standard on the type and/or amount of sanctions imposed.

Id. at 421 (emphasis supplied).

Despite its status as *dicta*, the multi-standard approach has been acknowledged subsequently by our Court in unpublished opinions.[4] The federal system, from which we adopted CR 11, has taken a different course.

Two years after *Clark*, the United States Supreme Court, presented with the same question, rejected the "multi-standard" approach, embracing instead the very "unitary abuse-of-discretion standard" that *Clark* declined to follow. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990). Today, twenty years after *Clark* was rendered, the vast majority of state courts apply the unitary abuse-of-discretion standard of review.[5] Only one other state, Utah, adheres to the

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[4] *See, e.g.*, *Caudill v. Thomas*, 2007 WL 2340785, p.2 (Ky.App. Aug 03, 2007)(NO. 2006-CA-000644-MR, 2006-CA-000884-MR). We particularly appreciate Judge Guidugli's opinion in *Smith v. Miller*, 2003 WL 22681426, pp.7-9 (Ky.App. Nov 14, 2003) (NO. 2002-CA-001146-MR) in which he recognized the adoption of the unitary abuse-of-discretion standard in *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990), noting that "[m]any federal district and appellate courts, including the Sixth Circuit Court of Appeals, as well as many state courts have followed this holding."

[5] Forty states and the District of Columbia utilize the unitary abuse-of-discretion standard: *Pacific Enterprises Oil Co. (USA) v. Howell Petroleum Corp.*, 614 So.2d 409, 425 (Ala. 1993); *Enders v. Parker*, 125 P.3d 1027, 1031 (Alaska 2005); *Hmielewski v. Maricopa County*, 192 Ariz. 1, 4, 960 P.2d 47, 50 (Ariz.App. 1997); *Weaver v. City of West Helena*, 367 Ark. 159, 238 S.W.3d 74, 77 (Ark. 2006); *580 Folsom Associates v. Prometheus Development Co.*, 223 Cal.App.3d 1, 19-20, 272 Cal.Rptr. 227, 236 (Cal.App. 1990)(reviewing order entered pursuant to then-existing corollary sanctions rule, Cal.C.C.P. § 128.5) and *Eichenbaum v. Alon*, 106 Cal.App.4th 967, 997, 131 Cal.Rptr.2d 296, 302 (Cal.App. 2003)(reviewing order entered pursuant to current rule modeled after FRCP 11, Cal.C.C.P. § 128.7); *In re Trupp*, 92 P.3d 923, 932 (Colo. 2004); *Ossen v. Wanat*, 21 Conn.App. 40, 48, 571 A.2d 134, 138 (Conn.App. 1990)(reviewing order entered pursuant to Practice Book § 111 which is only similar in nature to Rule 11); *Wilson v. B & R Transporters, Inc.*, No. C.A. 93C-05-019, 1994 WL 381001, at 1-2 (Del.Super. June 10, 1994)(applying *Cooter* but concluding ultimately that "there exists no effective method of reviewing a [Del.Misc. R.] Rule 5 [Delaware's version of Rule 11 for Justices of the Peace] sanction."); *Montgomery v. Jimmy's Tire & Auto Center, Inc.*, 566 A.2d 1025, 1028 (D.C. 1989); *Walden v. Shelton*, 270 Ga.App. 239, 242, 606 S.E.2d 299, 302 (Ga.App. 2004); *Gonsalves v. Nissan Motor Corp. in Hawaii, Ltd.*, 100 Haw. 149, 58 P.3d 1196, 1206 (Haw. 2002); *Lester v. Salvino*, 141 Idaho 937, 939, 120 P.3d 755, 757 (Idaho App. 2005); *Krawczyk v. Livaditis,* 366 Ill.App.3d 375, 379, 851 N.E.2d 862, 865 (Ill.App. 2006); *Kahn v. Cundiff*, 533 N.E.2d 164, 167 (Ind.App. 1989); *Weigel v. Weigel,* 467 N.W.2d 277, 280 (Iowa 1991); *Wood v. Groh*, 269 Kan. 420, 429, 7 P.3d 1163, 1171 (Kan. 2000); *Green v. Wal-Mart Store No. 1163*, 684 So.2d 966, 968 (La.App. 1996); *Estate of Dineen*, 721 A.2d 185, 188 (Me. 1998); *Vittands v. Sudduth*, 49 Mass.App.Ct. 401, 412, 730 N.E.2d 325, 336 (Mass.App.Ct. 2000); *Radloff v.*

same multi-standard approach embraced in *Clark*. We believe it is time Kentucky joined the majority of the states, not because of the popularity of the unitary approach, but because its underlying rationale is superior to the rationale for formally adopting the *Clark dicta*.

Since *Cooter*, only Utah, Hawaii, and Texas have had occasion to reconsider in depth the rationale and implications of these two different standards.

The Utah Supreme Court addressed its standard of review of Rule 11 sanctions for the first time in *Barnard v. Sutliff*, 846 P.2d 1229 (Utah 1992). After

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First Am. Nat'l Bank, 470 N.W.2d 154, 156 (Minn.App. 1991); *Eatman v. City of Moss Point*, 809 So.2d 591, 593 (Miss. 2000); *Harrington v. Farmers Union Co-Op. Ins. Co.*, 13 Neb.App. 484, 488, 696 N.W.2d 485, 490 (Neb.App. 2005); *Office of Washoe County Dist. Atty. v. Second Judicial Dist. Court ex rel. County of Washoe*, 116 Nev. 629, 636, 5 P.3d 562, 566 (Nev. 2000); *Masone v. Levine*, 382 N.J.Super. 181, 193, 887 A.2d 1191, 1198 (N.J.Super.A.D. 2005); *Rangel v. Save Mart, Inc.*, 140 N.M. 395, 399, 142 P.3d 983, 987 (N.M.App. 2006); *Dobrie v. Dobrie*, 236 A.D.2d 583, 654 N.Y.S.2d 652, 653 (N.Y.A.D. 1997); *Harris v. Daimler Chrysler Corp.*, 638 S.E.2d 260, 268 (N.C.App. 2006); *Simpson v. Chicago Pneumatic Tool Co.*, 693 N.W.2d 612, 618 (N.D. 2005); *Burrell v. Kassicieh*, 128 Ohio App.3d 226, 714 N.E.2d 442, 445 (Ohio App. 1998); *State ex rel. Tal v. City of Oklahoma City*, 61 P.3d 234, 240 (Okla. 2002); *Taylor v. Kerber*, 171 Or.App. 301, 308-09, 15 P.3d 93, 98(Or.App. 2000); *Francis v. Brown*, 836 A.2d 206, 212 (R.I.2003); *Prunty Const., Inc. v. City of Canistota,* 682 N.W.2d 749, 761 (S.D. 2004); *Krug v. Krug*, 838 S.W.2d 197, 205 (Tenn.Ct.App. 1992); *Breckenridge v. Nationsbank of Texas, N.A.*, 79 S.W.3d 151, 157 (Tex.App.-Texarkana 2002); *Williams & Connolly, L.L.P. v. People for Ethical Treatment of Animals, Inc.*, 273 Va. 498, 509, 643 S.E.2d 136, 140 (Va. 2007); *Bigelow v. Bigelow*, 171 Vt. 100, 108, 759 A.2d 67, 72 (Vt. 2000); *In re Marriage of Rich*, 80 Wash.App. 252, 258, 907 P.2d 1234, 1237 (Wash.App. 1996); *Bartles v. Hinkle*, 196 W.Va. 381, 389, 472 S.E.2d 827, 835 (W.Va. 1996); *Riley v. Isaacson,* 156 Wis.2d 249, 256, 456 N.W.2d 619, 622 (Wis.App. 1990); *LC v. TL*, 870 P.2d 374, 381 (Wyo. 1994). Only six states utilize any different standard: *Mercedes Lighting and Elec. Supply, Inc. v. State, Dept. of General Services,* 560 So.2d 272, 277 (Fla.App. 1990)("whether a pleading or motion is legally sufficient involves a question of law subject to *de novo* review by the appellate court"); *Jerico Const., Inc. v. Quadrants, Inc.*, 257 Mich.App. 22, 33, 666 N.W.2d 310, 318 (Mich.App. 2003)("clear error"); *Kranz v. Director of Revenue*, 764 S.W.2d 508, 509 (Mo.App. 1989)(*de novo* review); *Byrum v. Andren*, 337 Mont. 167, 159 P.3d 1062, 1068-69 (Mont. 2007)(two-tiered approach; "a district court's findings of fact will be overturned if clearly erroneous, and a court's legal conclusion that the facts constitute a violation of Rule 11 will be reversed if the determination constitutes an abuse of discretion."); *Father v. South Carolina Dept. of Social Services,* 353 S.C. 254, 578 S.E.2d 11 (S.C. 2003)(South Carolina Constitution requires the appellate court to "take its own view of the facts" determined by a trial judge sitting as a court of equity and, therefore, is constitutionally obligated to reject the unitary abuse-of-discretion standard.); *Morse v. Packer*, 15 P.3d 1021, 1025 (Utah 2000)(multi-standard approach, identical to *Clark*, 762 S.W.2d at 420). Our review of Maryland, New Hampshire, and Pennsylvania caselaw appears to indicate that appellate courts in those states have not yet had the occasion to address.

considering the unitary abuse-of-discretion standard of *Cooter*, the Utah court declared the opinion "confusing[.]" *Id.* at 1234.

> Even if we could make some sense of the conflicting statements in *Cooter & Gell*, we decline to adopt the abuse of discretion standard as the sole standard of review of a trial court's rule 11 findings. We think that an abuse of discretion standard would vest too much discretion in the trial courts on questions of law. The resulting indeterminacy would create great uncertainty in an area that already suffers from ambiguity in the governing standard of conduct.

Id. Rejecting all other standards, the court concluded "that Utah appellate courts should use the three-standard approach" because "[i]t uses understood standards of review" and "is consistent with the rule 11 jurisprudence that Utah appellate courts have developed thus far." *Id.* at 1235.

With due regard to the Utah analysis, we believe we understand *Cooter*. We note too that the unitary standard also uses one of the "understood standards of review" – abuse of discretion. Finally, we find the analysis and rationale of the Hawaii and Texas courts are a more comfortable fit with Kentucky jurisprudence.

In *Matter of Hawaiian Flour Mills, Inc.*, 868 P.2d 419 (Haw. 1994), Hawaii's Supreme Court rejected the multi-standard approach which had been adopted only two years earlier by Hawaii's intermediate appellate court in *De Silva v. Burton*, 832 P.2d 284 (Haw.App. 1992). The court reversed *De Silva* and adopted the unitary abuse-of-discretion standard.

The Hawaii court noted first the similarities of the two standards. "Under both the three-tiered and unitary abuse of discretion standards, a trial court 'would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.'" *Id.* at 433, *quoting Cooter,* 496 U.S. at 405, 110 S.Ct. at 2461. Furthermore, "under both standards the

appropriateness of the sanction imposed is reviewed for abuse of discretion." *Id.* at 433.

The Hawaii court then focused on the real difference in the two standards, namely, the degree of deference given to the trial court's conclusion that a particular pleading, motion or other paper violated, or did not violate, Rule 11. We agree with the Hawaii court that while such a determination "may be described as a conclusion of law, [it] is more appropriately reviewed for abuse of discretion." *Id.*

We also agree with the three factors underpinning the Hawaii court's reasoning.

First, "a Rule 11 inquiry is heavily fact-intensive, requiring careful consideration of the particular circumstances of each case, and involving questions of reasonableness, credibility and, often, motive[,]" *id.,* and the trial court is in the best position to assess all three.

Second, the trial courts are "[d]eployed on the front lines of litigation" and are "best acquainted with the local bar's litigation practices and thus best situated to determine when a sanction is warranted to serve Rule 11's goal of specific and general deterrence." *Id.* (citation omitted). Furthermore, adoption of the unitary standard will "enhanc[e] these courts' ability to control the litigants before them." *Id.* (citation and quotation marks omitted).

Third, given the fact-dependent nature of a trial court's Rule 11 determination, "little will be lost in terms of ensuring uniformity in the application of Rule 11 sanctions [since f]act-bound resolutions cannot be made uniform through appellate review, *de novo* or otherwise." *Id.* at 434 (citation and quotation marks omitted).

When the Texas Court of Appeals likewise rejected the multi-standard approach in *Home Owners Funding Corp. of America v. Scheppler*, 815 S.W.2d 884

(Tex.App. 1991), it relied on some additional reasoning from *Cooter*. The multi-standard approach, noted the court, would require an appellate court to determine whether the attorney's legal arguments were plausible at the time the pleadings were filed. "[S]uch investment of time and energy by the appellate court will either fail to produce the normal law-clarifying benefits that come from an appellate decision on a question of law, or else will strangely distort the appellate process by" engendering incongruent opinions from an intermediate court that typically does not review such cases *en banc*. *Id.* at 888 (citation and quotation marks omitted; "A *de novo* review would only create a myriad of opinions by appellate courts concerning what constitutes conduct which violates Rule [11], creating, rather than reducing, confusion on what guidelines lower courts should apply in these cases.").

The policy considerations identified by the Supreme Court in *Cooter*,[6] and by the Hawaii and Texas courts, are at least equally applicable in Kentucky. Therefore, we distinguish *Clark Equipment Company, Inc. v. Bowman*, 762 S.W.2d 417 (Ky.App. 1988) from the case before us and adopt the unitary abuse-of-discretion standard for review of all aspects of the imposition of Rule 11 sanctions by a trial court.

While both Hines and Pulliam eventually argue that the pleadings they filed did not violate CR 11, thereby calling for our application of the unitary standard, they first urge jurisdictional and procedural bases for reversal. These arguments involve purely legal questions which we will always review *de novo*. *Baze v. Rees*, 217 S.W.3d 207, 209 (Ky. 2006).

[6] Because CR 11 was based on the FRCP 11, federal case law construing FRCP 11 is persuasive authority with regard to the meaning of CR 11. *Taylor v. Morris*, 62 S.W.3d 377, 379 (Ky. 2001)(Where Kentucky procedural rule "mirrors" federal rule of procedure, "federal court decisions interpreting the latter rule may be accepted as persuasive authority[.]").

Sections IV and V, *infra*, address arguments unique to Hines. Sections VI and VII, *infra*, address arguments presented by the Pulliam Appellants only. Sections VIII and IX, *infra*, address arguments common to all appellants.

IV. ATTORNEY'S WITHDRAWAL DOES NOT AVOID SANCTIONS

Hines first asserts that the Jefferson Circuit Court lost jurisdiction to impose sanctions against him because it entered an order permitting his withdrawal on October 11 – more than two months before imposing those sanctions. There is no Kentucky case addressing this question. However, our review of persuasive authority leaves no doubt that Hines' position is untenable. Again we find the United States Supreme Court's position on this issue persuasive.

In *Cooter*, the Supreme Court explicitly rejected the Second Circuit's position – unique among the circuits – that "a voluntary dismissal acts as a jurisdictional bar to further Rule 11 proceedings." *Cooter*, 496 U.S. at 394-95, 110 S.Ct. at 2455 (*citing Johnson Chem. Co. v. Home Care Prods., Inc.*, 823 F.2d 28, 31 (2d Cir.1987)).[7] We, too, reject this argument.

Initially, we note that Hines' relationship with Kentucky courts is not, in the strictest sense, jurisdictionally based. By accepting admission to the practice of law in Kentucky, Hines voluntarily undertook the serious responsibilities of serving as an officer of every court in this Commonwealth. *Kentucky Bar Ass'n v. Cowden*, 727 S.W.2d 403, 405 (Ky.1987)("[A] licensed attorney . . . is an officer of the court and has

[7] This rule established by *Cooter* was partially superseded by the amendment of FRCP 11 in 1993 to include a "safe harbor" provision. This provision requires a party seeking Rule 11 sanctions to wait 21 days from the service of the motion before filing it with the court in order to give the offending party the opportunity to withdraw or appropriately correct the challenged paper, claim, defense, contention, allegation, or denial. FRCP 11(c)(1)(A). Consequently, a federal court can no longer issue sanctions under FRCP 11 in a case where, as in *Cooter*, a complaint was voluntarily dismissed within 21 days of a request for Rule 11 sanctions. *Photocircuits Corp. v. Marathon Agents, Inc.*, 162 F.R.D. 449, 452 (E.D.N.Y. 1995). Kentucky's CR 11 has not been modified since 1989 and therefore does not include the "safe harbor" provisions of FRCP 11.

an ethical duty to comply with all proper court procedure."). When Hines filed pleadings in this case, he subjected himself specifically to the inherent power of the Jefferson Circuit Court to see that Hines, and any party he represents, abides by that court's orders and rules. Those rules include CR 11.

The imposition of CR 11 sanctions against an attorney is a matter merely collateral to, and clearly independent of, the merits of a case. *Cooter,* 496 U.S. at 398. Until Hines invoked the jurisdiction of the appellate court, the Jefferson Circuit Court retained jurisdiction of the case even after the merits were no longer pending. *Id.* at 395. Consequently, that court also retained its inherent power to sanction an attorney who violated its orders or rules in that case. *Id.* at 395-96.

> It is well established that a . . . court may consider collateral issues after an action is no longer pending . . . . Like the imposition of costs, attorney's fees, and contempt sanctions, the imposition of a Rule 11 sanction is not a judgment on the merits of an action. Rather, it requires the determination of a collateral issue: whether the attorney has abused the judicial process, and, if so, what sanction would be appropriate.

Id. Cooter went on to hold that a trial court did not lack jurisdiction to address this collateral issue even "after the principal suit has been terminated [by voluntary dismissal]." *Id.* The rationale was obvious. "If a litigant could purge his violation of Rule 11 merely by taking a dismissal, he would lose all incentive to 'stop, think and investigate more carefully before serving and filing papers.'" *Cooter*, 496 U.S. at 398; *see also, Frank Annino & Sons Construction, Inc. v. McArthur Restaurants, Inc.*, 215 Cal.App.3d 353, 359, 263 Cal.Rptr. 592 (Cal.App. 2 Dist. 1989)("Adopting appellants' position would [mean a] party or an attorney could act in the most egregious bad faith . . . with impunity [and] avoid sanctions by simply dismissing the action[.]").

Nothing impedes the application of the same principle and underlying rationale to Hines' argument that his withdrawal deprived the trial court of jurisdiction to

impose Rule 11 sanctions upon him. If an attorney could purge or avoid his Rule 11 violation merely by withdrawing from representation in a case before the imposition of the sanction, he would lose all incentive to investigate more carefully before filing a civil action. *In Re Itel Securities Litigation,* 791 F.2d 672, 675 (9th Cir. 1986) ("There is absolutely no hint . . . that a lawyer may escape sanctions for misconduct simply by withdrawing from a case before opposing counsel applies for sanctions.").

"As the Rule 11 violation is complete when the paper is filed," Hines' withdrawal from representation "does not expunge the violation." *Cooter* at 385; *see also,* 2 James Wm. Moore *et al*, Moore's Federal Practice §11.23[6][a] (3d ed. 1999), *citing Itel* at 675, and *Lepucki v. Van Wormer*, 765 F.2d 86, 87 n.1 (7th Cir. 1985) ("An attorney who at any point certified that a document complied with Rule 11 is subject to the rule's strictures, regardless of whether he or she remains an attorney of record."); *accord*, Restatement (Third) of Law Governing Lawyers § 110, Comment g (2000)("A lawyer remains subject to the court's power to sanction under Federal Rule 11, even after the lawyer has withdrawn, so long as the court retains jurisdiction over the case.").

No authority cited by Hines is on point. All of it relates to judgments on the merits against parties dismissed from the subject action. None of his authority addresses the withdrawal of counsel. The argument that the Jefferson Circuit Court lacked jurisdiction to sanction Hines is without merit.

V. WAIVER OF RIGHT TO PURSUE SANCTIONS MUST BE UNEQUIVOCAL

Hines argues that the Appellees' "failure to object to counsel's withdrawal constituted a waiver of any right they might have to continue seeking sanctions against him." Calling the Appellees' attorneys "highly competent counsel," he still claims they "should have known the rules of law [that] when they stood by and allowed Hines to

withdraw as counsel or [sic] record without interposing any objection thereto, that they could not afterward continue seeking sanctions from him." We believe Hines' position is not warranted by existing law or a good faith argument for the extension, modification or reversal of existing law. *See* Section IV, *supra*.

Furthermore, the actions of Appellees' counsel cannot be construed by any reasonable legal practitioner as factually supporting a finding of waiver. *Pangallo v. Kentucky Law Enforcement Council,* 106 S.W.3d 474, 479 (Ky.App. 2003). It would have been Hines' burden to prove that waiver, *id.*, and we believe, even in the proper forum, he could not do so. The letter he received from Peoples' counsel made it clear that Appellees intended to continue pursuit of sanctions despite his withdrawal. Appellees' counsel even refused to sign an agreed order and, at the hearing on Hines' motion to withdraw (which Hines did not attend), those counsel stated that they could not agree to Hines' withdrawal, though they did not state that they objected to it. Absent an unequivocal expression or irrefutable proof of each element of waiver, Hines' argument is without merit and must fail.

VI. REPRESENTED PARTY'S SIGNATURE NOT A PRE-REQUISITE TO IMPOSITION OF SANCTIONS

The Pulliam Appellants claim the trial court "failed to note that CR 11 provides that sanctions may be awarded only against attorneys or parties who have actually signed" the offending pleading or other paper. This argument is refuted by the language of CR 11 itself.

> If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, *[or] a represented party*, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

CR 11 (emphasis added). The Sixth Circuit has interpreted this very language which also appears in the federal version of the rule.

> [A] non-signing party may be sanctioned under the "represented party" clause of Rule 11 if it is determined that his attorney has filed a pleading or other paper which is frivolous or filed for an improper purpose.

Homico Const. & Development Co. v. Ti-Bert Systems, Inc., 939 F.2d 392, 394 (6th Cir.1991); *see also* 35B C.J.S. Federal Civil Procedure § 1377 ("a client may be sanctioned under Rule 11 even if he or she does not sign the frivolous pleadings").

The Pulliam Appellants' argument that they could not be sanctioned because they did not sign the offending pleadings is without merit.

VII. REPRESENTED PARTY NOT IMMUNE TO CR 11 SANCTIONS WHERE BASES ARE NOT EXCLUSIVELY ERRORS OF LAW

The Pulliam Appellants claim (1) that the trial court imposed sanctions on the basis of errors of law only and (2) that "a represented party cannot be sanctioned for errors of law made by his attorney." We need not address the correctness of this second contention though we do not discount the possibility that the Appellants are wrong. *See Byrne v. Nezhat,* 261 F.3d 1075, 1118 (11th Cir.2001), *citing Pelletier v. Zweifel,* 921 F.2d 1465, 1519-20 (11th Cir.1991).[8]

We do not agree with the Pulliam Appellants that the basis of the trial court's sanctions was legal error only. We begin by noting some of the Pulliam Appellants' factual assertions: (1) Appellees and others colluded; (2) Appellees committed a fraud upon the trial court; and (3) Pulliam was deceived in such a way that he missed the opportunity to intervene before the Appellees entered into the agreed order of dismissal. Other than these unsupported factual averments, the offending

[8] We also note that the federal prohibition against sanctioning a represented party for purely legal errors committed by his attorney is built into FRCP 11(b)(2) and 11(c)(5)(A). This particular prohibition is not reflected in CR 11.

motions, to use Judge McDonald-Burkman's phrase, are "not supported by **any** facts[.]" (Emphasis in original).

Appellants also claim in the motion to set aside the agreed order that certain sealed documents contain "evidence which is needed for such proof" of their averments as would satisfy CR 11. This Court examined those sealed documents. Many were obviously available to Pulliam at one point since they are sealed exhibits to his own deposition. Other sealed documents include correspondence initiated by government banking authorities, portions of which were copied to Pulliam. The remaining documents, despite our careful scrutiny, do not appear to provide any factual support for the Pulliam Appellants' claims in any regard.

While the order does reflect that the motions to intervene were "not warranted by existing law or by a good faith argument for the extension, modification or reversal of existing law[,]" this was not the only foundation upon which the decision to award sanctions was based. The trial court ruled that the motions "were untimely[,] having been filed approximately 16 years after the agreed judgment had been entered" and were "not supported by **any** facts[.]" (Emphasis in original). The trial court further found that the offending documents "were filed for an improper purpose." The trial court did not expressly state that improper purpose. However, it is obvious from the record and arguments of counsel on both sides of the motion that the real purpose was to obfuscate the issues, and to attempt to impact the judgments, in the actions in federal court and in the Nelson Circuit Court.

We have held that "CR 11 . . . forbids the filing of an action for an improper purpose" and have authorized sanctions against both attorney and represented parties where the filing of documents with a court is "frivolous and so totally lacking in merit so as to appear to have been taken in bad faith[.]" *Raley v. Raley*, 730 S.W.2d 531, 531

(Ky.App. 1987).[9] The order in this case clearly shows that the trial court conducted the proper inquiry, that is, to determine whether the filing of the motion to intervene was "reasonable under the circumstances." *Louisville Rent-A-Space v. Akai*, 746 S.W.2d 85, 87 (Ky.App. 1988). The trial court answered that question in the negative.

We also note that the Appellants did not seek an additional finding from the trial court, as was their right under CR 52.02, that the basis of the order was solely an erroneous legal theory. In the absence of such a finding, we cannot conclude from our review that such was the case. Appellants' argument to the contrary is without merit.

VIII. DUE PROCESS MUST PRECEDE IMPOSITION OF SANCTIONS

Hines, in his Pre-hearing Statement, and the Pulliam Appellants in their brief, argue that they did not receive proper notice of the motions for sanctions, or an opportunity to be heard. The record shows otherwise.

We construe Appellants' argument as a claim they were denied due process. "[A]lthough the assessment of sanctions under Rule 11 must comport with due process, the procedure employed to assure due process will 'depend on the circumstances of the situation and the severity of the sanction under consideration.'" *INVST Financial Group, Inc. v. Chem-Nuclear Systems, Inc.,* 815 F.2d 391, 405 (6th Cir. 1987)(quoting FRCP 11, advisory committee note to the 1983 amendment; CR 11 most closely resembles this version of the federal rule). The advisory committee note to FRCP 11 goes on to state, "In many situations the judge's participation in the proceedings provides him with full knowledge of the relevant facts and little further inquiry will be necessary."

[9] Rule 11 sanctions have been upheld even "where the sanctions were not based on bad faith 'but on counsel's incompetence in handling [the] matter by making "frivolous" and "worthless" claims "without first making a proper inquiry into the relevant law and facts."'" *INVST Financial Group, Inc. v. Chem-Nuclear Systems, Inc.,* 815 F.2d 391, 405 (6th Cir. 1987), *quoting Rodgers v. Lincoln Towing Service, Inc.*, 771 F.2d 194, 206 (7th Cir. 1985).

Legal treatises summarizing the federal courts' interpretations of Rule 11 illustrate consensus. A trial court

> adequately safeguards a party's due process rights where the court gives the party opportunity to respond in writing to the sanctions motion and holds a hearing on the motion. However, the opportunity to be heard does not always require an evidentiary hearing.
>
> A formal hearing is not required, for example, when a document is sanctionable on its face, or when the [trial] judge is familiar with the factual basis for sanctions. When an evidentiary hearing is not required, the requirement of an opportunity to be heard may be satisfied by the party's response to the motion for sanctions.

61A Am. Jur. 2d Pleading § 640 (Motions for Sanctions in Federal Practice Under FR Civ P, Rule 11, Opportunity to be Heard – Generally)(footnotes omitted); *see also*, 35B C.J.S. Federal Civil Procedure § 1386 (Sanctions Proceedings Generally)("no requirement that a full evidentiary hearing be held . . . attorney or party against whom sanctions are imposed must be given notice and an opportunity to be heard or to respond."). While *Clark, supra,* indicates in *dicta* that "a trial court should not impose sanctions without a hearing[,]" *Clark* at 421, we interpret this consistently with the above-cited persuasive authority to mean an "opportunity to be heard."

We have no doubt that due process guarantees were satisfied in this case. *See Kentucky Cent. Life Ins. Co. v. Stephens*, 897 S.W.2d 583, 590 (Ky. 1995)("Procedural due process is not a static concept, but calls for such procedural protections as the particular situation may demand."). The Pulliam Appellants were represented at every stage of the proceeding, first by Hines and finally by Tabler.

Hines presents a slightly different argument. He claims his lack of notice of the December 14 oral argument of the CR 11 motions deprived him of the right to respond. Specifically, he claims he did not have the opportunity to respond to the

charge, contained in Appellees' counsels' supplemental affidavit, that his motion to certify the orders denying intervention violated CR 11. This argument fails.

The order imposing sanctions makes no reference to, nor do sanctions appear to be imposed because of, Hines' August 25 motion to certify the March 8 and July 13 orders. The focus is upon Hines' filing of the February 17 motion (and memoranda) to intervene and the March 21 motion (and memoranda) to alter, amend, or vacate the order denying intervention. The propriety of those motions was fully debated during the June 20 hearing. Hines fully participated in that hearing. In fact, his participation included his filing of more supporting memoranda with more pages than the local rules permit, and without obtaining leave of the trial court to exceed the limits of those rules. Nevertheless, the trial judge stated she would consider the rule-offending submissions anyway.

There is further indication the trial court did not consider the supplemental affidavits of Appellees' counsel. The award of sanctions in the form of attorney fees only includes those fees incurred through the date each Appellee filed its CR 11 motion in late July. The trial court did not award the additional fees incurred by Peoples ($690.00) and by Barnett Bank ($1023.50) after they filed their respective motions for sanctions. These additional fees are the real subject of Appellees' counsels' supplemental affidavits.

Furthermore, our review of the short, videotaped December 14 oral argument does not disclose any factual or legal assertion or argument, by any party, not previously presented at the June 20 hearing. We are convinced that oral argument had no bearing on the trial court's decision to impose sanctions.

The Appellants' arguments relating specifically to notice and opportunity to be heard, and generally to due process guarantees, are without merit.

IX. TRIAL COURT DID NOT ABUSE ITS DISCRETION BY IMPOSING CR 11 SANCTIONS AGAINST HINES APPELLANTS AND PULLIAM

We are left with the argument, common to Hines and Pulliam, that because their motion to intervene was meritorious, they could not have violated CR 11. Therefore, they argue, the trial court's order to the contrary should be reversed. We disagree.

We have previously stated that the trial court engaged in the proper inquiry – whether the filing of the motion to intervene was "reasonable under the circumstances." The proper inquiry before this Court is whether the trial court abused its discretion when answering that question in the negative.

The record is, in effect, in two parts. The original action is in two volumes taking up 262 pages, plus Pulliam's deposition and sealed exhibits, and a small number of documents under seal from the Kentucky Department of Financial Institutions. This portion of the record ends on October 12, 1989. The record picks up again, over fifteen years later, on February 17, 2005, with Appellants' attempt to intervene. This second portion of the record includes six (6) more volumes, including more than 900 additional pages, and the videotape of eight (8) different court appearances. We have reviewed the entire record in an attempt to glean the factual or legal basis upon which Appellants' claims might be cognizable. We were unsuccessful.

We therefore hold that the trial court did not abuse its discretion by awarding sanctions against Appellants, jointly and severally, equaling only a portion of the attorney fees incurred by each of the Appellees in defending the attempted intervention. The Jefferson Circuit Court's December 21, 2005, order imposing sanctions jointly and severally against Appellants is affirmed.

ALL CONCUR.

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